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In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 689

BEVERLY CALL SHEW and
JOHN WILLIAM SHEW,
Petitioners

versus

UNITED STATES OF AMERICA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, BEVERLY CALL SHEW and JOHN WILLIAM SHEW, pray that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit to review the judgment of that court affirming judgment of the United States District Court for the Middle District of North Carolina.

OPINION BELOW

The judgment of the Court of Appeals for the Fourth Circuit (Petitioners' Appendix I) is not yet reported.

JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit sought to be reviewed was entered on November 18, 1963. The jurisdiction of this court is invoked pursuant to Title 28 U.S.C. Section 1254.

QUESTION PRESENTED

Where Federal Officer arrests one petitioner at a point approximately 200 yards from a building on petitioners' curtilage without an arrest warrant at nighttime, and then goes to and enters said building and arrests the other petitioner therein and then proceeds to search said building without a valid search warrant, and seizes incriminating evidence, is said search invalid as being repugnant to the Fourth Amendment to the Constitution of the United States and hence inadmissible as evidence in a criminal proceeding instituted against the petitioners for violation of the Internal Revenue laws relating to distilled spirits?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment Four to the Constitution of the United States, Title 26 U.S.C. Sections 5601, 5222, 5205, 5604, 5179 and 5173.

STATEMENT OF THE CASE

The petitioners, who are husband and wife, were each charged in a Bill of Indictment containing four specific counts, charging each of them with possession of a non-registered distilling apparatus, of carrying on the business

of distillers of spirituous liquors without having given the requisite bond, for making and fermenting mash fit for distillation or for the production of distilled spirits other than on premises designated according to law, and for possession of a quantity of distilled spirits not having affixed to the containers thereof stamps evidencing the determination of the federal tax thereon.

Prior to this case coming on for trial in the District Court, the petitioners in apt time filed written Motions for the Suppression of the Evidence on the grounds that the evidence of the government had been secured by means of an unlawful search of their premises in violation of the Fourth Amendment to the Constitution of the United States. The Motions of the petitioners were denied by the District Court.

The District Court having denied the Motions of the petitioners entered the following judgments:

1. BEVERLY CALL SHEW

Imprisonment for a period of 18 months and a fine of $2,500.00. The imposition of the prison sentence was suspended and she was placed on probation for a period of 5 years, one of the conditions of probation being that the fine be paid by July 1, 1963. Pursuant to a subsequent Order entered by the District Court the payment of the fine and the Order admitting the petitioner, BEVERLY CALL SHEW, to probation was stayed pending the appeal.

2. JOHN WILLIAM SHEW

As to Counts 1, 2 and 3 of the Bill of Indictment consolidated for the purpose of judgment, the District Court entered judgment of imprisonment for a period of 2 years.

As to Count 4 of the Bill of Indictment, he was sentenced to imprisonment for a period of 3 years, to begin at the expiration of the sentence of imprisonment on Counts 1, 2 and 3 consolidated. The 3-year prison sentence was suspended and he was admitted to probation for a period of 5 years, said Order of Probation to be effective on the date of his release from prison as to Counts 1, 2 and 3. JOHN WILLIAM SHEW was admitted to bail pursuant to an Order of the District Court.

Notice of Appeal to the Court of Appeals for the Fourth Circuit was filed by each of the petitioners in apt time.

The facts and circumstances of the procurement of Evidence by the United States through its Treasury Officers and upon which the United States relies for the conviction of the petitioners are as follows:

On the 17th or 18th day of June, 1962, Robert G. Martin, Investigator of the Alcohol & Tobacco Tax Division of the Internal Revenue Service, at his office in Salisbury, North Carolina, received information from the Sheriff of Davie County, which county adjoins Rowan County, the location of Mr. Martin's office, that there was an illicit distillery located in a barn on the premises of the petitioners. The barn and premises were located in the Davie School section of Davie County, approximately 20 miles from Salisbury, North Carolina. Davie County was within the area in which Officer Martin carried on his duties out of his Salisbury office.

On June 18, 1962, Officer Martin, along with Rowan County ABC Officers Graham and Hodge, went to a wooded area adjacent to the petitioners' premises. They

arrived at 8:30 o'clock p.m., which was nighttime. They had no search warrant nor an arrest warrant for the petitioners or any other person. At all times material to this controversy a United States Commissioner was available in Salisbury, North Carolina, to whom the Federal Officers could have applied for a search warrant or for warrant of arrest.

There was situate on the petitioners' premises a dwelling house and a barn. The barn was located approximately 50 to 60 yards from the dwelling house. The dwelling house was being used as such by the petitioners and the members of their family. They had lived there for approximately 4 months next preceding the 18th day of June, 1962. The Federal Officers stationed themselves approximately 250 yards from the dwelling house and approximately 150 to 200 yards from the barn.

After having arrived in the wooded area at 8:30 o'clock p.m. to make observation, the officers observed that lights were on in the barn. They also immediately detected "the strong, distinct odor of mash, cooked mash emanating from the barn, and heard a thumping sound, it seemed like, that was being made by a steam boiler." They also immediately observed a stake-body truck backed into an opening in the barn with only the cab of the truck being within their range of vision. They could hear a scraping sound that seemed like cardboard over metal.

They observed the foregoing from 8:30 o'clock p.m. until 9:45 o'clock p.m. and without having made any effort to procure a search warrant. At 9:45 o'clock p.m. a pack of hound dogs came from the residence of petitioners to the area where the officers were stationed and began bark-

ing. The dogs barked for some time. Later while the dogs were still barking the petitioner, JOHN WILLIAM SHEW approached the area where the officers were concealed. When the petitioner, JOHN WILLIAM SHEW, got to where the officers were concealed he was placed under arrest by Officer Martin. This was 150 to 200 yards from the barn.

After placing petitioner, JOHN WILLIAM SHEW, under arrest Officer Martin immediately went to the barn of the petitioners and left JOHN WILLIAM SHEW in the custody of the other officers. When Officer Martin arrived at the barn he went to the opening in the barn where the stake-body truck had been backed into the said opening and there saw the petitioner, BEVERLY CALL SHEW. At this time Officer Martin entered another part of the interior of the barn and found an illicit distillery. The barn was completely enclosed with the exception of the opening where the stake-body truck had been backed into. It was not until he had entered the opening in the barn that he saw illicit distilled spirits on the stake-body truck. At no time did the officers have a search warrant or any other process for the arrest or search of the petitioners or their premises.

FEDERAL JURISDICTION

This was a criminal action instituted by the United States upon an Indictment charging the petitioners with violations of criminal statutes under the Internal Revenue Code of 1954, Title 26 U.S.C., Sections 5601, 5222, 5205, 5004, 5179 and 5173. This was the basis for federal jurisdiction of this case.

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

The decision of the Court of Appeals in this case is in conflict with applicable decisions of the Supreme Court of the United States and specifically in conflict with the following decisions:

1. *Agnello* v. *United States*, 269 U.S. 20 (1925);
2. *McDonald* v. *United States*, 335 U.S. 451 (1948);
3. *Rabinowitz* v. *United States*, 339 U.S. 56 (1950);
4. *Johnson* v. *United States*, 333 U.S. 10 (1947);
5. *Chapman* v. *United States*, 365 U.S. 610 (1960);
6. *Jones* v. *United States*, 357 U.S. 493 (1958).

In the case at bar the Court of Appeals held that the search of the petitioners' premises was incident to a lawful arrest of the petitioner, JOHN WILLIAM SHEW, some 200 yards therefrom and of the petitioner, BEVERLY CALL SHEW, who was within an enclosure of the barn at the time the Federal Officer entered the barn. It is conceded that the Officer had no warrant of arrest for either of the petitioners, nor a search warrant for the search of the petitioners' private premises or dwelling. It is further conceded that the purported arrests of the petitioners and the objected to search took place at nighttime.

In *Agnello* v. *United States*, supra, this Court held as a matter of law with respect to the interpretation of the Fourth Amendment to the Constitution of the United States.

"While the question has never been directly decided

> by this court, it has always been assumed that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein . . . The protection of the Fourth Amendment extends to all equally,—to those justly suspected or accused, as well as to the innocent. The search of a private dwelling without a warrant is in itself unreasonable and abhorrent to our laws. Congress has never passed an act purporting to authorize the search of a house without a warrant."

If the court below were relying upon the arrest of the petitioner JOHN WILLIAM SHEW as being the instrument by which the search of the petitioners' private premises were searched, then and in that event, the arrest of the petitioner, JOHN WILLIAM SHEW, having been some 200 yards from the place searched the same would be in conflict with the decision of the court in *Agnello v. United States*, supra.

After the arrest of the petitioner, JOHN WILLIAM SHEW, the Federal Officer immediately proceeded toward the barn on the curtilage of the petitioners' property. There was a truck backed into the main entrance to the barn. The petitioner, BEVERLY CALL SHEW, was standing at the rear of the truck which was backed into the entrance. At that time the Federal Officer placed BEVERLY CALL SHEW under arrest. It is to be noted that the Officer entered the main entrance to the barn prior to the arrest of the petitioner, BEVERLY CALL SHEW. Immediately after the arrest of BEVERLY CALL SHEW the Officer proceeded to search the barn and found certain incriminating evidence which was used at the trial of the petitioners.

resulting in their conviction of the charges contained in the Bill of Indictment.

In *McDonald* v. *United States*, supra, this court held that where a Federal Officer, by standing in a chair, in the hallway of an apartment house and looking through a transom into the defendant's room and thereby observing certain lottery paraphernalia in the room and thereafter knocking upon the door and arresting the person coming to the door invalidated the subsequent search by the Federal Officers of the room.

Therefore, the dicision of the Court of Appeals is in conflict with the decision in *McDonald* v. *United States*, supra, for the reason that the Federal Officer made his entry into the barn of the petitioners prior to the arrest of the petitioner, BEVERLY CALL SHEW.

Petitioners contend that any right whatsoever of the Federal Officer to search the barn of the petitioners must of necessity stem from the arrest of the petitioner, JOHN WILLIAM SHEW, some 200 yards from the barn and that this arrest not being lawful within the barn itself invalidates the subsequent search on the authority of *Agnello* v. *United States*, supra.

In *Rabonicitz* v. *United States*, supra, this court held that where the Federal Officer had a valid warrant for the arrest of the accused and lawfully arrested the accused within a one-room office building and simultaneously therewith searched the room itself validated the search as being incident to the lawful arrest of the accused. This case seems to be the most liberal case of this court validating searches incident to a lawful arrest of the accused. How-

ever, in *Rabinowitz* a lawful arrest had taken place within the room searched. The authority as set forth in *Rabinowitz* does not extend to an arrest which has taken place some 200 yards from the place searched.

In *Johnson* v. *United States*, supra, Federal Officers knocked upon the door of a hotel room where the Officers had recognized a distinct and strong odor of opium emitting therefrom. After hearing some scuffling from within the room and after some delay the accused opened the door and the Officers immediately placed the defendant under arrest and searched the room, finding certain incriminating evidence against the accused. This court held that the defendant's motion to suppress the evidence under these facts should have been granted. The Court said:

> "At the time entry was demanded the officers were possessed of evidence which a magistrate might have found to be probable cause for issuing a search warrant. We cannot sustain the defendant's contention, erroneously made, on the strength of *Taylor* v. *United States*, 286 U.S. 1, that odors cannot be evidence sufficient to constitute probable grounds for any search. That decision held only that odors alone do not authorize a search without warrant. If the presence of odors is testified to before a magistrate and he finds the affiant qualified to know the odor, and it is one sufficiently distinctive to identify a forbidden substance, this Court has never held such a basis insufficient to justify issuance of a search warrant. Indeed it might very well be found to be evidence of most persuasive character."

It is quite evident that the officers in the case at bar had

sufficient evidence to justify an impartial magistrate to issue a search warrant for the petitioners' premises on the basis of the holding in *Johnson* v. *United States*, supra, but this is not the case. No search warrant was obtained and the officers, as was done in the *Johnson* case, sought to justify the arrests by the search and at the same time to justify the search by the arrests. See also *Chapman* v. *United States*, supra, where this court held that belief alone of incriminating evidence existing within a dwelling does not validate a search without a warrant.

In *Jones* v. *United States*, supra, this court held that the search of the accused's premises without a search warrant at nighttime was invalid even though the officers were armed with a day time search warrant, had found hot mash coming from within the house and had arrested 2 men in a truck leaving the house and the truck having thereon 413 gallons of liquor, and the arrest of the 2 men in the truck having occurred in near proximity to the house. The court said:

> "It is settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. *Agnello* v. *United States*, 269 U.S. 20, 33; *Taylor* v. *United States*, 286 U.S. 1, 6. The decisions of this Court have time and again underscored the essential purpose of the Fourth Amendment to shield the citizen from unwarranted intrusions into his privacy. See, e.g., *Johnson* v. *United States*, 333 U.S. 10, 14; *McDonald* v. *United States*, 335 U.S. 451; cf. *Giordenello* v. *United States*, decided today, *ante*, p. 480. This purpose is realized by Rule 41 of the Federal Rules of Criminal Procedure, which implements the Fourth

Amendment by requiring that an impartial magistrate determine from an affidavit showing probable cause whether information possessed by law-enforcement officers justifies the issuance of a search warrant. Were federal officers free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified."

Therefore, your petitioners respectfully pray that the court grant the Petition for a Writ of Certiorari for the reasons as set forth hereinabove.

Respectfully submitted.

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PETITIONERS' APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 9067

United States of America,
Appellee,

versus

Beverly Call Shew,
John William Shew,
Appellants.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA, AT GREENSBORO, SALISBURY DIVISION. EDWIN M. STANLEY, DISTRICT JUDGE.

(Argued November 7, 1963. Decided November 18, 1963.)

Before HAYNSWORTH and BELL, Circuit Judges, and CRAVEN, District Judge.

John E. Hall and McElwee & Hall on brief, for Appellants.

and William H. Murdock, United States Attorney, (R. Bruce White, Jr., Assistant United States Attorney, on brief) for Appellee.

PER CURIAM:

Reversal of their convictions of offenses relating to whisky is sought by these defendants on the basis of a contention that their motion to suppress evidence of the existence of the still and of the illegal whisky was wrongfully denied. We find the contention to be without merit.

Agents concealed themselves in woodlands some 200 yards from a barn. It was in the early part of the nighttime and the agents could see that lights were on in the barn. They testified they could hear the thumping sounds of a still's boiler in the barn and could smell the odor of illegal whisky coming from it. Some dogs got scent of the agents, too, and John William Shew, heeding the barking of the dogs, came out of the barn and walked some 200 yards to the edge of the woods where the agents and the dogs were. After his flashlight revealed to him the presence of the agents, they identified themselves and arrested him. His clothing was covered with mash.

One of the agents then proceeded toward the barn. Though John William Shew had been instructed to remain silent, he began shouting warnings to his confederates. When the agent got close to the barn, he saw Mrs. Shew standing by a truck which was backed up to the main entrance of the barn. The truck was loaded with illegal whisky. Remarks were being exchanged by Mrs. Shew with an unidentified person in the barn. Mrs. Shew was

placed under arrest and the agent entered the barn. As he did so, however, the unidentified third person escaped through a window and was not apprehended. The agent saw within the barn a large distillery.

This case is governed by our recent decision in United States v. Young, 4 Cir., 322 F. 2d 443. What we said there need not be elaborated here. The circumstances, particularly the need to apprehend the fleeing third participant, warranted the agent's entry into the barn. Clearly there was probable cause for the arrest of all three participants. There was no ransacking of the barn, of course, for the large distillery it contained was immediately and obviously apparent as soon as the agent entered the barn. The search, however, was plainly a reasonable one in connection with the arrest of Mrs. Shew and the attempt to arrest the third participant in the criminal activity.

Affirmed.